(3)

NO. 94-2122

In the
Supreme Court of the United States

OCTOBER TERM, 1995

HARRIS JARREAU
PETITIONER

V.

IN THE MATTER OF THE COMPLAINT OF
PORT ARTHUR TOWING COMPANY ON BEHALF OF
THE M/V MISS CAROLYN FOR EXONERATION
FROM LIMITATION OF LIABILITY
RESPONDENT

CONSOLIDATED WITH

IN THE MATTER OF JOHN W. TOWING, INC.,
AS OWNER AND OPERATOR OF THE M/V JOHN W.,
PRAYING FOR EXONERATION FROM
OR LIMITATION OF
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT
PORT ARTHUR TOWING COMPANY'S
BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether the decision of the United States Court of Appeals for the Fifth Circuit conflicts with applicable decisions of this Court.

PARTIES TO THE PROCEEDINGS AND DESIGNATION OF CORPORATE RELATIONS

The parties to these proceedings are Petitioner, Harris Jarreau, an adult citizen and resident of the State of Louisiana, and Respondent, Port Arthur Towing Company, a privately held corporation. Fredeman Shipyard, Inc. is a subsidiary of Port Arthur Towing Company.

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STATEMENT OF THE CASE

On June 15, 1991, a collision occurred between the M/V JOHN W., a tugboat owned and operated by John W. Towing, Inc. (hereinafter referred to as "JWT"), and the M/V MISS CAROLYN, a tugboat owned and operated by Port Arthur Towing Company (hereinafter referred to as

"PATCO"). Both PATCO and JWT filed suit under the Limitation of Liability Act, 46 U.S.C. App. §§ 181-189 (1988), with the United States District Court for the Western District of Louisiana, Lake Charles Division. The district court issued a Writ of Injunction, which stayed the concurrent state court action.

Petitioner, Harris Jarreau, was one of four (4) crewmembers who filed claims in the limitation action. Additionally, JWT filed a claim against PATCO for damages sustained by the M/V JOHN W in the collision.

The claims of two (2) crewmembers were settled. The remaining crewmembers, Petitioner and Joshua Verdin, filed a motion to lift the stay. Petitioner and Verdin entered into stipulations, which would enable them to proceed in the forum of their choice. The stipulations were not adequate as JWT was not a party to the stipulations. Petitioner, Verdin and JWT attempted to negotiate mutually agreeable stipulations; however, agreement was never reached. The three parties informed the district court that they had abandoned their efforts to agree upon stipulations. Thus, the district court denied the motion to lift the stay. This denial was not appealed. The district court bifurcated the trial, and, after the issues of liability, limitation and exoneration were tried, the court exonerated JWT from all liability and found PATCO solely responsible for the collision. Following a bench trial on damages, the district court found that claimant, Verdin, had carried his burden of proof and awarded Verdin $12,000.00 for his injuries. Verdin did not appeal from this award, and the same has been settled in total.

The district court found that Petitioner's testimony regarding his injury was not credible. The court specifically held that Petitioner failed to establish by a preponderance of the evidence that the collision caused his injuries. Thus, the court exonerated PATCO from liability to Petitioner.

Petitioner filed a notice of appeal with the United States Court of Appeals for the Fifth Circuit. In a reported decision, *Complaint of Port Arthur Towing M/V MISS CAROLYN,* 42 F.3d 312 (5th Cir. 1995), the Fifth Circuit affirmed the district court's decision. Subsequently, the Fifth Circuit denied Petitioner's Petition for Panel Rehearing and Petition for Rehearing En Banc.

Following the collision in question, Captain Wilbur Garner and Robert Gibson, crewmembers of the M/V MISS CAROLYN, boarded the M/V JOHN W to provide assistance. Captain Garner spoke with Petitioner, who told Garner that no crewmember aboard the M/V JOHN W was injured. Later, Petitioner told Gibson that he was not hurt but was going to sue as a result of the collision.

Approximately five days after the collision, Petitioner gave a statement wherein he again denied sustaining any injury to his back, head, legs or arms. At trial, Petitioner attempted to explain this statement by testifying that he was stunned and caught up in the excitement following the collision. However, Petitioner later testified that he was no longer stunned when he gave this statement. Petitioner did not seek immediate medical attention following the collision. There were no witnesses to Petitioner's alleged injury.

Although Petitioner claimed to have sustained a disabling back injury as a result of the collision, he continued to ride his 1000 pound Harley-Davidson motorcycle with a gang named "The Henchmen", until he was injured in a motorcyle accident three (3) months after the collision in question. Further, Petitioner participated in at least three (3) physical altercations subsequent to the collision with no apparent problems.

REASON FOR DENYING THE PETITION

The decision of the United States Court of Appeals for the Fifth Circuit does not conflict with applicable decisions of this Court.

Petitioner cites Rule 10.1(c) as the basis for his Petition for Writ of Certiorari. It appears that Petitioner is contending that the Fifth Circuit in *Complaint of Port Arthur Towing M/V MISS CAROLYN,* 42 F.3d 312 (5th Cir. 1994) "...decided a federal question in a way that conflicts with applicable decisions of [the Supreme] Court." However, there is no support for Petitioner's contention.

Petitioner cites three United States Supreme Court cases; *Fitzgerald v. United States Lines Co.,* 374 U.S. 16, 83 S.Ct. 1646, 10 L.Ed.2d 720 (1963); *Engle v. Davenport,* 271 U.S. 33, 46 S.Ct. 410, 70 L.Ed. 813 (1926); and *Panama R. Co. v. Vasquez,* 271 U.S. 557, 46 S.Ct. 596, 70 L.Ed 1085 (1926). The Fifth Circuit's decision in the instant cause does not conflict these decisions. Neither *Fitzgerald, Engle* or *Vasquez* are limitation of liability cases. Therefore, Petitioner's reliance upon the same is misplaced. Further, the instant cause does not present special and important reasons warranting review on writ of certiorari.

The district court and the Fifth Circuit decisions in the instant cause were well reasoned and correct. PATCO and JWT filed suit under the Limitation of Liability Act, 46 U.S.C. App. § 181, *et seq.* Appropriately, the district court stayed the concurrent state court action. The instant cause is precisely the circumstance which the Limitation of Liability Act addresses. As stated by this Court:

> It is, therefore, crystal clear that the operation of the [Limitation of Liability] Act is directed at misfortunes at sea where the losses incurred exceed the value of the vessel and the pending freight. And, as is pointed out in *British Transport Commission, supra,* where the fund created pursuant to the Act is inadequate to cover all damages and the owner has sought the protection of the Act the issues arising from the disaster could be litigated within the limitation proceeding. Otherwise the purpose of the Act, i.e., limitation of the owner's liability, might be frustrated. Only in this manner may there be a marshalling of all the statutory assets remaining after the disaster and a concurse of claimants.

Lake Tankers Corporation v. Henn, 354 U.S. 147, 151-152, 77 S.Ct. 1269, 1272, 1 L.Ed.2d 1246 (1957).

There are exceptions which allow a claimant(s) to pursue an action outside the limitation proceeding in the forum of his choice. When a claimant(s) enter into stipulations sufficient to protect the shipowner's interest, the claimant(s) should be allowed to proceed in state court. As stated by the Fifth Circuit:

> Claims may proceed outside the limitations action (1) if they total less than the value of the vessel, or (2) if [all] claimants stipulate that the federal court has exclusive jurisdiction over the limitation of liability proceeding and that [the claimants] will not seek to enforce a greater damage award until the limitation action has been heard by the federal court.

Complaint of Port Arthur Towing M/V MISS CAROLYN, 42 F.3d 312, 316 (5th Cir. 1995), quoting *Odeco Oil and Gas Co.*, 4 F.3d at 404 (citing *Lake Tankers Corp.*, 354 U.S. at 151-53, 77 S.Ct. at 1271-72); *See In Re Two "R" Drilling Co.*, 953 F.2d 576, 578 (5th Cir. 1991) (analyzing sufficiency of claimants' stipulations).

In the instant cause, all claimants did not enter into the appropriate stipulations. The stipulations proposed by Petitioner and Verdin were inadequate to protect PATCO's right to limit its liability. Thus, the district court's refusal to lift the stay in this limitation proceeding was proper.

Petitioner voluntarily abandoned his efforts to enter into stipulations which would have allowed the district court to lift the stay. (Appendix 1). Furthemore, Petitioner did not appeal the denial of the motion to lift the stay, although an interlocutory appeal from the denial of Petitioner's motion to lift the stay would have been proper. *See Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560 (5th Cir. 1981). Rather than appealing the denial of the motion to lift the stay, Petitioner submitted himself to the jurisdiction of the district court and allowed the trial on the issues of liability, limitation and exoneration and the subsequent trial on damages to proceed. Petitioner had his day in court. The distirct court found that Petitioner did not prove that he sustained his alleged injury as a result of the collision. The district court specifically found that Petitioner was not credible and exonerated PATCO. The district court's decision was affirmed by the Fifth Circuit in a well-reasoned opinion.

CONCLUSION

Respondent followed all the rules and requirements of law in filing its limitation of liability action. Therefore, the stay imposed by the district court was proper. All claimants did not enter into adequate stipulations, which would have enabled the district court to lift the stay. Petitioner did not appeal the denial of the motion to lift the stay. Rather, Petitioner submitted himself to the jurisdiction of the district court and the issues of exoneration, limitation and liability and damages were tried by the district court.

Petitioner has not demonstrated that the Fifth Circuit's opinion conflicts with applicable decisions of this Court. Further, there are no other special and important reasons which warrant review by this Court.

For this and all the foregoing reasons, Respondent, Port Arthur Towing Company, respectfully requests that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

Filed
Jun 2 1993

IN THE MATTER OF THE COMPLAINT OF PORT ARTHUR TOWING COMPANY, ON BEHALF OF M/V MISS CAROLYN, FOR EXONERATION FROM OR LIMITATION OF LIABILITY	CIVIL ACTION NO. 91-2591 JUDGE TRIMBLE MAGISTRATE JUDGE WILSON

CONSOLIDATED WITH

IN THE MATTER OF JOHN W. TOWING, INC., AS OWNER AND OPERATOR OF THE M/V JOHN W., PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY	CIVIL ACTION NO. 91-2693 JUDGE TRIMBLE MAGISTRATE JUDGE WILSON

MINUTE ENTRY

A telephone conference was held on June 2, 1993 in the above-captioned matter with counsel for all parties participating.

The parties informed the undersigned that they have abandoned efforts to agree upon stipulations which would allow the lifting of the stay. Therefore, the Limitation of Liability Action will go forward on June 30, 1993, and the court will try the issues as previously outlined.

With regards to the Motion for Contempt and Sanctions filed by Hunter Lundy against Joshua Tilton for filing an action in Texas, Mr. Lundy informed the court that he would ask his client about withdrawing the contempt charges if Mr. Tilton dismisses the action filed in Texas state court without prejudice. Mr. Tilton agreed to pay Mr. Lundy's expenses for filing this motion if the motion is withdrawn. These parties will notify the court of their decision in this matter.

The undersigned informed the parties that he is willing to allow Commander Cole to testify concerning the applicable navigation rules if Commander Cole is made reasonably available to the defendants for deposition. The defendants are entitled to retain an expert of their own on these issues, and this expert should be made reasonably available to the plaintiffs for deposition.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana this 2nd day of June, 1993.

/s/ Alonzo P. Wilson

ALONZO P. WILSON
UNITED STATES
MAGISTRATE JUDGE